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Supreme Court of the United States

October Term, 1971

71 - 547

MARIANO FLORES JIMENEZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Mariano Flores Jimenez petitions for a writ of certiorari	1
Opinion Below	2
Jurisdiction	2
Statement of The Case Federal questions raised in California courts.	2
Questions for Review Presented By This Petition	5
Statutes Involved (Appendix pp. 7-11)	5
Brief Statement of Facts	6
Argument	9
I The arrest of petitioner at the door of his home without a warrant of arrest was without probable or reasonable cause, in violation of the Fourth and Fifth Amendments to the United States Constitution	9
II The search of petitioner's apartment and of his nearby garage by police officers without a search warrant was unlawful and without reasonable or probable cause, in violation of petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution	14
III The refusal of the trial court to require disclosure of the identity of the purported confidential reliable informant denied petitioner a fair trial and due process under the Fifth Amendment to the United States Constitution	17
Conclusion	20

TABLE OF AUTHORITIES CITED

Cases	Page
Aguilar v. Texas, 378 U.S. 108	15
Alderman v. United States, 394 U.S. 172	12
Beck v. Ohio, 379 U.S. 89	13
Chimel v. California, 395 U.S. 752	16
Cunha v. Superior Court, 2 Cal.3d 353	10, 11
Eleazer v. Superior Court, 1 Cal.3d 847	19
Honore v. Superior Court, 70 Cal.2d 162	19
James v. Louisiana, 382 U.S. 36	17
Johnson v. United States, 333 U.S. 10	15
Jones v. United States, 363 U.S. 257	12, 13
Katz v. United States, 389 U.S. 347	15
Ker v. California, 374 U.S. 23	17
Mancusi v. DeForte, 392 U.S. 364	15
McCray v. Illinois, 386 U.S. 300	19
People v. Gallegos, 62 Cal.2d 176	13
People v. Garcia, 67 Cal.2d 830	19
People v. Govia, 235 Cal.App.2d 285	10, 11
People v. Marshall, 69 Cal.2d 51	10, 11
People v. McGrew, 1 Cal.3d 404	10, 11

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
People v. Reeves, 61 Cal.2d 268	13
Remers v. Superior Court, 2 Cal.3d 659	10, 11
Roviaro v. United States, 353 U.S. 53	18, 19
Schmerber v. California, 384 U.S. 757	15
Shipley v. California, 395 U.S. 818	16
Spinelli v. United States, 393 U.S. 410	13
Stoner v. California, 376 U.S. 483	15, 16
Terry v. Ohio, 392 U.S. 1	11
Vale v. Louisiana, 399 U.S. 30	15, 16, 17
Von Cleef v. New Jersey, 395 U.S. 814	16, 17
Whitely v. Warden of Wyoming Penitentiary, ... U.S. ....., 28 L.Ed.2d 306	14
Wong Sun v. United States, 371 U.S. 471	12, 13

Statutes (United States)

United States Constitution	
Amendment IV	3, 4, 5, 8, 9, 10, 11, 14, 17
Amendment V	4, 5, 9, 17
Amendment XIV	5, 9, 14, 17
28 U.S.C. 1257(3)	2

TABLE OF AUTHORITIES CITED

Statutes (California)	Page
Evidence Code	
Section 1041	5, 8
Section 1042	5, 8
Health and Safety Code	
Section 11531	2, 5
Section 11911	3, 5
Penal Code	
Section 1538.5	3, 5

IN THE SUPREME COURT OF THE UNITED STATES

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No. .....

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice Warren Berger, and to the Honorable Associate Justices of the Supreme Court of the United States:

COMES NOW Mariano Flores Jimenez and respectfully petitions this Honorable Court for a writ of certiorari directed to the Supreme Court of the State of California and to the Court of Appeal of the State of California, Second Appellate District, Division Two, to review and reverse the judgment of conviction of petitioner rendered in the Superior Court of Los Angeles County on June 19, 1969, and the judgments

affirming the conviction by said reviewing courts, and in respect thereto petitioner sets forth as follows:

OPINION BELOW

The opinion of the California Court of Appeal was rendered on May 20, 1971, and certified for nonpublication, so it will not be printed, but a copy of the opinion is attached hereto as Appendix "A." A Petition for Hearing in the California Supreme Court was timely filed, but said court denied the petition on July 21, 1971, and a copy of the order of denial is attached hereto as Appendix "B." By reason of the above, the remedy of petitioner in California courts has been exhausted and the judgment of conviction is now final and nonreviewable therein.

JURISDICTION

This Court has jurisdiction to review this case and to entertain the petition for certiorari under Section 1257(3) of Title 28, U.S.C.

STATEMENT OF THE CASE

Federal Questions Raised in California Courts.

Petitioner was convicted on June 19, 1969, of two counts of violation of the California Health and Safety Code as follows:

(a) Count V, sale of marijuana on August 5, 1968, in violation of Section 11531.

(b) Count VI, possession for sale on August 5, 1968, of

restricted dangerous drugs in violation of Section 11911.

The conviction was by the Superior Court of Los Angeles County, Honorable Kathleen Parker, Judge, sitting without a jury, a jury having been waived.

At the preliminary examination on November 25, 1968, in the Municipal Court of San Antonio Judicial District in Los Angeles County, a request was made by petitioner for the disclosure of the identity of the alleged confidential reliable informant, but the police refused so to do and this refusal was upheld by the magistrate (C.T. 10-12)[1]. Objection was also made by defense counsel to the introduction of the evidence obtained by the arrest and searches without warrants, for lack of probable cause and in violation of the Fourth Amendment. The objection was overruled (C.T. 58-60).

On April 22, 1969, petitioner made a motion in the Los Angeles Superior Court to suppress all the evidence admitted at the preliminary examination, under the provisions of Section 1538.5 California Penal Code, on the ground of illegal search and seizure, and also moved for a discovery order requiring the police to disclose the identity of the alleged confidential informant. Said motions were denied (M.T. 21, 59, 67).

At the trial on June 13, 19, it was stipulated: that the cause might be submitted on the Reporter's Transcript of the preliminary examination and of the hearing on the motions to suppress and for discovery for the disclosure

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1. The Reporter's Transcript of the preliminary examination, which was included in the Clerk's Transcript, will be referred to by the initials "C.T." The Reporter's Transcript on the motion to suppress the evidence under Section 1538.5 of California Penal Code will be referred to by the initials "M.T." The Reporter's Transcript of the trial will be referred to by the initials "R.T."

of the identity of the informant; that all exhibits at the preliminary examination were deemed offered and received; that the objections by either side be deemed to have been made and to be continuous objections; and that all motions, including motions of defendant to suppress and for disclosure, be deemed to be renewed at the trial.

At the trial the petitioner was found guilty of the aforesaid offenses and was sentenced to state prison.

The federal questions raised at the trial were the illegality of the arrest of petitioner, the illegality of the search of his home, and the illegality of the search of his garage at a distance from the place of his arrest, all done without a warrant of arrest or search warrant, in violation of his rights under the Fourth Amendment to the United States Constitution. The federal question was also raised as to the refusal of the police to disclose the identity of the alleged confidential reliable informant, which refusal was upheld by the trial court, thereby denying petitioner a fair trial and due process under the Fifth Amendment to the United States Constitution.

The same contentions were raised on appeal by petitioner, but the California Court of Appeal rejected such contentions in its opinion affirming the judgment of conviction (Appendix "A") and the California Supreme Court denied the Petition for Hearing based upon the same grounds and issues (Appendix "B").

Petitioner submits that the foregoing federal questions were raised at every step of the proceedings in his case.

QUESTIONS FOR REVIEW PRESENTED BY THIS PETITION

(1) Was the arrest of petitioner, without a warrant of arrest and without probable cause, unlawful and in violation of petitioner's rights under the Fourth and Fifth Amendments to the United States Constitution?

(2) Was the search of petitioner's apartment and the nearby garage, by police officers, without probable cause and without a search warrant, unlawful and in violation of petitioner's constitutional rights under the Fourth and Fifth Amendments to the United States?

(3) Did the refusal of the police and prosecution to disclose the identity of the purported confidential informant, and the denial by the trial court of petitioner's motion for disclosure, deny petitioner a fair trial and due process under the Fifth Amendment to the United States Constitution?

STATUTES INVOLVED

Petitioner was convicted in a non-jury trial for sale of marijuana in violation of Section 11531 of the California Health and Safety Code and for possession for sale of a restricted dangerous drug in violation of Section 11911 of Health and Safety Code. The pertinent portions of these statutes have been set forth in Appendix "C" to this petition. Also set forth in Appendix "C" hereto are: California Penal Code Section 1538.5; California Evidence Code Sections 1041 and 1042; and pertinent parts of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

BRIEF STATEMENT OF FACTS

Police officers received information on August 5, 1968, from a purported reliable informant that narcotics were being sold by a Mexican named Tooty, usually in kilo packages carried in large brown paper bags from an apartment at 2117 East 81st Street, Los Angeles, California, and that a female (Esther Delgado) who lived with him handled the narcotic transactions during the daytime. The officers placed the apartment under surveillance and saw Delgado drive to an apartment in Huntington Park, pick up two paper bags, and return to 2117 East 81st Street. Later in the afternoon she drove to a factory in South Gate where she picked up the Mexican, "Tooty," later identified as a co-defendant, Arthur Bates, and returned to the 2117 address. About eight in the evening Bates left 2117 and went into an apartment at 2109 East 81st Street, several doors away, and then returned. Thereafter, co-defendant Wolford drove up to 2109 in a Volkswagen bus and entered carrying a large black suitcase. A little later petitioner left 2109, entered 2117, and exited therefrom carrying two opaque paper bags resembling bags used in markets, and re-entered 2109. The tops of the bags were folded over about three inches; the surveilling officer, Walker, could not see what was in them.

Later, petitioner came out with two paper bags, went down a dark driveway between the two apartment houses, out of sight of the officers, and returned without the bags. Wolford later left 2109, got into the Volkswagen, drove up the darkened driveway, obtained two bags from somewhere out of the sight of the officers, and placed them in his Volkswagen bus and drove away.

Other officers, Burke and Rosario, after receiving advice from Officer Walker by radio, stopped Wolford's bus some distance away. Officer Rosario flashed his light into the bus. Despite the surveilling officer's testimony that the tops of the bags were folded over so that he could not see the contents, Rosario testified that the bags were open and he could see wrapped packages that looked like kilo packages. Wolford was thereupon arrested by Officer Burke without a warrant, the bus was searched, and the two paper bags containing paper-wrapped bricks, kilos of marijuana, were seized.

The two paper bags were introduced in evidence. The record reflects that the witness removed from one bag what appeared to be a brick-like substance wrapped in brown wrapping paper, completely sealed so one could not tell what was contained therein; it was not cellophane. Officer Burke testified that prior to opening the bags nothing had occurred specifically to warrant Wolford's arrest. The two paper bags were on the floor behind the driver's seat and could only be observed by the officer looking into the window of the car. The contents could only be determined by removing the bags from the car, taking out a wrapped brick, and breaking the wrapped brick open.

Immediately after Wolford was arrested by Officer Burke, he stated that he had bought the marijuana in the bags from a guy named Mariano; that he gave Mariano $520.00; that Mariano left the house and returned in a few minutes; that Mariano directed him down a darkened driveway and said, "There is your bag"; and that he put the bags in his bus and departed.

Officer Burke then radioed to Walker what had occurred. Burke and other officers went to 2109, knocked, and when petitioner opened the door, Burke arrested him and the officers conducted a search of the apartment, finding no contraband. During the search they found a key in a kitchen drawer and used it to unlock the door of an attached nearby garage. In the garage they found a suitcase; they opened it and found three paper bags containing a quantity of dangerous drugs. The officers then went to 2117 and arrested co-defendants Bates and Esther Delgado and searched the apartment, finding drugs and marijuana packaged in kilo form. (Petitioner was not charged with possession of said contraband.)

The arrests of Wolford, petitioner Jimenez and the other defendants were all made without warrants of arrest. The searches of Wolford's bus, of Jimenez's apartment at 2109 East 81st Street, of the attached garage, and of 2117 East 81st Street were all made without search warrants. The objection of petitioner to the introduction of the evidence obtained by such searches was overruled by the trial court. The trial court's ruling in this respect was in violation of the Fourth Amendment to the United States Constitution.

The alleged reliable informant gave the officers information concerning narcotic activities of Bates and Esther Delgado at 2117 East 81st Street. The informant never mentioned 2109, nor petitioner Jimenez, nor Wolford, and the officers had no knowledge thereof. Petitioner's counsel requested the disclosure of the identity of the alleged informant, but the officers refused to disclose the same, under the provisions of Sections 1041 and 1042 of California Evidence

Code. As pointed out above, the motions by petitioner's counsel–made at various stages of the proceeding, including the trial–for such disclosure were denied. The denial by the trial court of said motions for disclosure deprived petitioner of a fair trial and due process under the Fifth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I

The Arrest Of Petitioner At The Door Of His Home Without A Warrant Of Arrest Was Without Probable Or Reasonable Cause, In Violation Of The Fourth And Fifth Amendments To The United States Constitution.

The police received information from the purported reliable informant with respect to dealing in contraband only as to one "Tooty," identified later as Bates, and only as to the apartment located at 2117 East 81st Street, an apartment some distance from the apartment house in which the apartment of petitioner was located at 2109 East 81st Street. The police had no information concerning petitioner or his apartment. As indicated above, they saw him go to No. 2117, come out with two opaque paper bags of the type usually used by grocery customers, take the bags down a dark driveway, out of sight, and return without them. The police were not able to see what was in the bags. Later, Wolford drove his Volkswagen bus up the driveway, went out of the sight of the officers, returned with two similar paper bags, loaded them in his bus and drove away. His

bus was stopped and searched at a distance from the East 81st Street location, and the bags and packages therein were opened and marijuana was found. Wolford was arrested and immediately told the arresting officers that he had purchased the marijuana from a "guy named Mariano" who told him to pick up the bags in a darkened driveway, and Wolford did so. The record showed that the marijuana was packaged in brick form in opaque brown wrapping paper, so the nature of the contents was indiscernible.

The officers who arrested Wolford then radioed to Sergeant Walker what they had found, and Walker and Lt. Brown went to the door of 2109, where petitioner lived, and knocked. When petitioner opened the door, they arrested him at the door and proceeded to search his apartment. No attempt was made by the officers to obtain either a warrant of arrest or a search warrant.

Petitioner asserts that his arrest was unlawful and without probable cause, in violation of his constitutional rights under the Fourth Amendment. In support of this contention in his brief on appeal to the California Court of Appeal, petitioner cited a number of California cases, among which were: *People v. Govia,* 235 Cal.App. 285; *People v. Marshall,* 69 Cal.2d 51; *People v. McGrew,* 1 Cal.3d 404; *Remers v. Superior Court,* 2 Cal.3d 659; *Cunha v. Superior Court,* 2 Cal.3d 353.

In *Govia,* as in the instant case, the officers saw something handed to one of the occupants of a car, which was stopped and the occupants arrested, but the officers did not know what it was nor did they have any previous knowledge of the occupants. The court held the arrest was unlawful,

being without probable cause.

In *Marshall*, the court held that an opaque paper bag, even though a smell of marijuana emanated therefrom, was not within the plain sight exception, because the contents could not be determined except by opening the bag. A search warrant was necessary for that purpose, and, so, the evidence was held inadmissible under the Fourth Amendment.

In *McGrew*, the search without a warrant of a footlocker at an airport, where the defendant had checked his baggage, was held invalid under the Fourth Amendment. The bricks of marijuana were packaged in opaque paper, and there was no probable cause to believe the packages contained marijuana.

In *Remers*, the court held that the passing of tinfoil wrapped items did not establish probable cause for the search and arrest of Remers, even though the arresting officer knew Remers had numerous previous narcotic arrests.

In *Cunha*, officers saw petitioner and another man, in an area where numerous narcotic arrests had occurred, exchange some unknown objects. They arrested and searched petitioner, finding heroin. The court held that the arrest, being without a warrant, was without probable cause, in violation of the Fourth Amendment (citing *Terry v. Ohio*, 392 U.S. 1).

The officers in this case arrested Wolford without probable cause, since they had no information concerning him or his bus, and they were unable to see what was in the paper bags he carried in his bus. Although the officer relaying the information to the officers who arrested Wolford

testified that the tops of the bags were folded over so he could not see the contents, one arresting officer testified that he could see into the bags and see paper wrapped packages.

The trial court ordered that the record show that the wrapping was with opaque paper. Thus, there was no probable cause under the above-cited California cases for the arrest of Wolford and the search of the bags in his bus.

What the officers discovered by their illegal arrest and search was radioed to the officers surveilling petitioner's apartment, and petitioner Jimenez was arrested at the door of his apartment without a warrant. This arrest, we submit, was based upon evidence illegally obtained by the arrest of Wolford and the search of his car. We contend that the subsequent arrest of petitioner was thereby tainted, and because of the unlawful arrest of petitioner, all evidence thereafter obtained by a search of his apartment and garage was not incident to a lawful arrest and was tainted as being "fruit of the poisonous tree."

In *Wong Sun v. United States,* 371 U.S. 471, while the Court held that the seizure of heroin from one Yee did not entitle Wong Sun to object to its use against him, the statement of Toy after his unlawful arrest was so tainted that it could not be used to corroborate Wong Sun's admissions against himself.

The Court, in *Alderman v. United States,* 394 U.S. 172, and in *Jones v. United States,* 363 U.S. 257, announced the same rule that only a person whose privacy was invaded has standing to object to the use of evidence obtained by an unlawful search.

In the instant case, as in *Wong Sun*, petitioner's arrest was due to the unlawful arrest of Wolford and the search of his bus. Petitioner's arrest was tainted thereby and was unlawful, so that he was a person aggrieved by the unlawful conduct of the officers. He was a person against whom the search was directed, because the prosecution contended that the marijuana found in Wolford's bus originated from petitioner and from petitioner's apartment, which was subjected to search. The matter is within the purview of the Court's statement in *Jones*, at 267, that "anyone legitimately on the premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him."

Since the unlawful arrest and search of Wolford led directly to the arrest of petitioner, the arrest of petitioner was so tainted as itself to be unlawful.

The statement of Wolford that he purchased the marijuana from "a guy named Mariano" was insufficient to establish probable cause for the arrest of petitioner, because Wolford was not a reliable informant—the police officers were not acquainted with him and had never previously received information from him. *Beck v. Ohio*, 379 U.S. 89; *Spinelli v. United States*, 393 U.S. 410; *People v. Reeves*, 61 Cal.2d 268; *People v. Gallegos*, 62 Cal.2d 176.

The conviction of petitioner for sale of marijuana to Wolford should be reversed because of insufficiency of the evidence to establish the sale by him, for the reason that Wolford's statement, being hearsay, was incompetent and inadmissible against petitioner.

It was incumbent also upon the prosecution to obtain an arrest warrant of petitioner, because no great emergency existed. In such event a warrant was a necessity. In the

recent case of *Whitely v. Warden of Wyoming Penitentiary*, ... U.S. ....., 28 L.Ed.2d 306, this Court stated at page 312:

> ". . . [T]he state argues that a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than a court would employ in reviewing a magistrate's assessment of probable cause as a prelude to issuing an arrest or search warrant. That proposition has been consistently rejected by this Court."

The Court, in *Whitely*, held that the arrest warrant was without probable cause and that the arrest of petitioner was also without probable cause.

II

The Search Of Petitioner's Apartment And Of His Nearby Garage By Police Officers Without A Search Warrant Was Unlawful And Without Reasonable Or Probable Cause, In Violation Of Petitioner's Rights Under The Fourth And Fourteenth Amendments To The United States Constitution.

After petitioner's arrest at the door of his apartment, the officers made an immediate and detailed search of the rooms therein and found no contraband. In a kitchen drawer they found a key with which they unlocked petitioner's nearby garage. In a bag, similar to the bag previously seen by the officers being carried by Wolford into petitioner's apartment, the police, upon opening it, found pills of dangerous drugs. Petitioner was convicted in Count VI of

the possession for sale of said drugs.

The search of the apartment and garage was unlawful for several reasons:

First, the search was made without a search warrant, which is a necessity in the absence of any exigency of circumstances, which exigency did not exist here. If the officers had probable cause to arrest petitioner and search his apartment, they had ample time to obtain a search warrant, but they made no attempt to do so.

In *Schmerber v. California*, 384 U.S. 757, at page 770, this Court stated:

> "Search warrants are usually required for searches of dwellings. . . . The requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' "

(Citing *Johnson v. United States*, 333 U.S. 10, 13-14; *Aguilar v. Texas*, 378 U.S. 108, 110-111.)

The requirement of the obtaining of a search warrant before a search can be made, except in certain well-defined cases, has been enunciated by a number of the decisions of this Court, among which are: *Stoner v. California*, 376 U.S. 483; *Mancusi v. De Forte*, 392 U.S. 364, 370; *Katz v. United States*, 389 U.S. 347; *Vale v. Louisiana*, 399 U.S. 30.

In *Vale*, the Court stated at page 35:

> "The officers were able to procure two warrants for Vale's arrest. They also had information that he was residing at the address where they found him. There is thus no reason so far as anything before us appears

> to suppose it was impracticable for them to obtain a search warrant as well (citing cases). We decline to hold that an arrest on the street can provide its 'exigent circumstance' so as to justify a warrantless search of the arrestee's house."

Second, the search of the garage was not made in the immediate area of petitioner's arrest and hence was unlawful. In *Chimel v. California*, 395 U.S. 752, officers armed with an arrest warrant, but not a search warrant, arrested the defendant in apparently the front room of a three-bedroom house. They then made a search of the entire house. This Court held that there was no justification for a search of any room other than in the room where the arrest occurred, nor even for a search of desk drawers or other closed or concealed areas in that room itself without a search warrant.

In *Vale v. Louisiana, supra*, the defendant was arrested at his front steps. Without a search warrant the officers searched the whole house. This Court, in holding the search unlawful, stated at page 33:

> "A search may be incident to an arrest 'only if it is substantially contemporaneous with the arrest and is confined to the *immediate vicinity of the arrest.*" (Emphasis added.)

(Citing *Shipley v. California*, 395 U.S. 818, 819; *Stoner v. California, supra*, at 486.)

In *Shipley v. California*, the arrest took place 15 or 20 feet from the house, and the search of the house was held unlawful. In *Von Cleef v. New Jersey*, 395 U.S. 814, the petitioner was arrested on the third floor of a 16-room

house. The search of the entire house was held unlawful.

In the instant case, the search of petitioner's home uncovered no narcotics. The officer then went to the garage, a distance from the place of petitioner's arrest, and searched it. They eventually had to open a suitcase therein and search it to find drugs, the possession of which petitioner was convicted. Obviously, said search went far beyond the "immediate vicinity" of the arrest; and under the cases cited above, the search was unlawful and in violation of petitioner's rights under the Fourth and Fourteenth Amendments. The California courts committed constitutional error in admitting into evidence the fruits of the illegal search. *Vale v. Louisiana, supra; Ker v. California,* 374 U.S. 23; *James v. Louisiana,* 382 U.S. 36.

Third, the search without a search warrant cannot be justified by any "exigency of circumstances." In *Vale,* the Court, at page 35, delineated circumstances wherein the lack of a search warrant could be excused–none of which existed in this case.

III

The Refusal Of The Trial Court To Require Disclosure Of The Identity Of The Purported Confidential Reliable Informant Denied Petitioner A Fair Trial And Due Process Under The Fifth Amendment To The United States Constitution.

The informer used by the police gave no information concerning any narcotic activities of petitioner nor of any narcotic activities occurring in petitioner's apartment. In

view of petitioner's plea of not guilty to the sale of marijuana to Wolford, the testimony of the informant might have been of great importance to petitioner's defense. It must be noted that the officers did not see any transaction between Wolford and petitioner. There is only an inference or suspicion that the two grocery-type paper bags they saw petitioner take up the dark driveway and the two bags Wolford brought back with him after going up the dark driveway were the same. The bags, so far as any proof was concerned, could have been entirely different. Thus, there was only a suspicion that a narcotic transaction occurred between Wolford and petitioner, and this was insufficient to support a finding of guilt beyond a reasonable doubt.

Wolford's statement to the police that he purchased the marijuana from petitioner was hearsay and incompetent to prove any narcotic transaction occurred with petitioner.

In light of the above, the disclosure of the identity of the informant to petitioner might use him as a witness at the trial became important, and the denial of the right to have disclosure was a denial to petitioner of a fair trial and due process.

In *Roviaro v. United States*, 353 U.S. 53, this Court stated at page 60:

> "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action."

In the instant case the Court of Appeal ignored decisions of the California Supreme Court following the *Rovario* rule requiring the disclosure of the identity of the informant when the informant may be a material witness on the issue of guilt, namely: *Eleazer v. Superior Court*, 1 Cal.3d 847; *Honore v. Superior Court*, 70 Cal.2d 162; *People v. Garcia*, 67 Cal.2d 830.

We are not unmindful of the decision of this Court in *McCray v. Illinois*, 386 U.S. 300. In that case, prior to trial, a motion was made for the disclosure of the identity of the informant and to suppress the evidence. At the hearing the court denied the motion, and the defendant was later convicted on the evidence sought to be suppressed. This Court held that the informer's identity need not always be disclosed. The Court pointed out that the officers were under searching cross-examination and the judge exercised the discretion vested in him under Illinois law. The Court distinguished *Rovario* by stating that the denial there took place at the trial and not at a preliminary hearing or prior proceeding as in *McCray*. Even so, this Court divided five to four on the issue.

In the instant case, although the request for disclosure took place at both the preliminary hearing and at the hearing on the motion to suppress and for discovery, by stipulation all motions were deemed to be renewed at the trial and all rulings of the courts at the other proceedings were deemed objected to. Thus, the issue on the disclosure of the identity of the informant was raised at the trial, as in *Rovario*.

This case is further distinguishable from *McCray* in that the officers did not testify as to any statements made to them by the informant pertaining to petitioner. It is then

conceivable that the testimony of the informant could have tended to exonerate petitioner. The denial of the right to disclosure was therefore prejudicial and denied petitioner a fair trial and due process.

CONCLUSION

Wherefore, petitioner Mariano Flores Jimenez prays that this Court grant certiorari and reverse the judgments of the California courts.

Respectfully submitted,

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APPENDIX

	Page
"A"	
Opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two	1
"B"	
Denial of Petition for Hearing, California Supreme Court	6
"C"	
Statutory Provisions Involved	
California Health and Safety Code	
§ 11531	7
§ 11911	7
California Penal Code	
§ 1538.5	7
California Evidence Code	
§ 1041	9
§ 1042	10
United States Constitution	
Amendment IV	11
Amendment V	11
Amendment XIV	11

APPENDIX "A"

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MARIANO FLORES JIMENEZ, Defendant and Appellant.

2D CRIM. NO. 17583.

S. CT. NO. A 406 621.

[FILED - May 20, 1971]

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Parker, Judge. Reversed in part; affirmed in part.

Messrs. Lewis, Gershan & Castillo by Russell E. Parsons, for Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, Leonard R. Milstein, Deputy Attorney General, for Respondent.

THE COURT:

Defendant appeals from the judgment entered following a nonjury trial that resulted in his conviction for possession of marijuana for sale in violation of Health and Safety Code section 11530.5, sale of marijuana in violation of Health and Safety Code section 11531, and possession for sale of a restricted dangerous drug in violation of Health and Safety Code section 11911. He contends: "I There was insufficient probable cause for the arrest of Jiminez and hence his arrest

was illegal. II The evidence was insufficient to establish a sale of marijuana as charged in Count V. III The People failed to prove that Jiminez had dominion, control and knowledge of the presence and narcotic character of the marijuana found in Wolford's bus nor that he had dominion, control and knowledge of dangerous drugs in the pills found in the suitcase in the garage. IV The refusal of the officers to disclose the identity of their informant requires a reversal of the judgment of conviction and a dismissal of this case." We have concluded that these contentions are without merit.

The evidence is not in dispute. Having received information from a reliable informant that narcotics were being sold in large quantities, usually in kilo packages carried in large brown paper bags, from an apartment at 2117 East 81st Street, Los Angeles Police Officer Walter Burke and several other officers began a surveillance of the apartment on August 5, 1968. Several transactions took place that afternoon, one of which involved two large brown paper bags.

At approximately 8 p.m. one of the occupants of 2117 entered an apartment several doors away at 2109 East 81st Street and then returned to 2117. Thereafter, codefendant Wolford drove up in a red and white Volkswagen bus and entered 2109 carrying a large black suitcase. A short time later, appellant came out of 2109 and went into 2117 where he obtained two large brown paper bags which he placed in the driveway of 2109 before he re-entered this apartment. Wolford then exited 2109, drove his Volkswagen bus to the driveway of 2109, placed the bags in the bus, re-entered 2109 for a few minutes and drove off.

Two officers approached the Volkswagen bus at a stop sign and asked for Wolford's driver's license. One of the

officers directed the beam of his flashlight into the back of the bus and saw two large brown paper bags with their tops open. Clearly visible inside the bags were a number of brick shaped objects individually wrapped in brown wrapping paper. Officer Burke, a narcotics officer, formed the opinion, later confirmed by laboratory tests, that the objects were kilos of marijuana. Wolford was arrested and the marijuana was confiscated.

Shortly thereafter, appellant was arrested in his apartment, 2109, and a search revealed $3,645 in cash, a gas company bill for that apartment in his name, and a key to a garage. A suitcase found inside the garage contained a large quantity of benzedrine tablets. A search of the other apartment, 2117, subsequent to the arrest of its occupants, revealed a large quantity of marijuana, much of which was in kilo form.

Appellant's first contention is without merit. There was sufficient probable cause for his arrest, the search incident to that arrest was legal, and the pills recovered as a result of that search were admissible evidence. The officers, while conducting a surveillance of 2117 as a result of information received from a reliable informant, observed certain activities relating to 2109, an apartment several doors away. As a result of these observations, they had sufficient probable cause to stop Wolford for investigative purposes. The observation of the marijuana through the window of the Volkswagen bus, leading to Wolford's arrest and its confiscation, was not an unlawful search.

"Looking through the window of an automobile is not unlawful. Observation of that which is in view is lawful, whether the illumination is daylight, moonlight, lights within

the vehicle, lights from street lamps, neon signs or lamps, or the flash of lights from adjacent vehicles (citation); that the light comes from a flashlight in an officer's hand makes no difference. (Citations.)" (*People v. Superior Court*, 3 Cal. App.3d 636, 639.)

As a result of their observations and the recovery of the marijuana, the officers had sufficient probable cause to arrest appellant without relying on any statements made by Wolford after his arrest. Appellant's argument concerning the reliability of Wolford when considered as an informant is, therefore, irrelevant.

Since the search of the garage occurred prior to the decision in *Chimel v. California*, 395 U.S. 752, and that decision is not retroactive (*People v. Edwards*, 71 Cal.2d 1096), the search was reasonably incident to appellant's arrest because the garage was a part of the place where he was arrested and under his dominion and control. (*People v. Dixon*, 46 Cal.2d 456.)

Appellant's contention that the evidence was insufficient to establish that he had sold, or aided and abetted in a sale of marijuana to Wolford, is no more than a suggestion that we should reweigh the evidence. This, of course, we cannot do. (*People v. Kemp*, 55 Cal.2d 458, 471.)

Similarly, where, as here, there is substantial direct and circumstantial evidence supporting the trier of fact's determination that an accused exercised dominion and control over contraband, with knowledge of its presence and its narcotic character, such determination is binding on appellate review. (*People v. Groom*, 60 Cal.2d 694, 696-697.)

Appellant's final contention, that the officers improperly refused to disclose the identity of the reliable inform-

ant, is without merit. Evidence Code sections 1041 and 1042, subdivision (c), provide that the identity of an informer need not be disclosed unless the necessity for disclosure in the interest of justice outweighs the necessity for preserving the confidentiality of his identity.

" '[A] defendant seeking to discover the identity of an informant bears the burden of demonstrating that, "in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial." (Citations.)' " (*People v. Meyers*, 6 Cal.App.3d 601, 609; see also, *Honore v. Superior Court*, 70 Cal.2d 162.) In the instant proceeding appellant has failed to make any showing that there was a reasonable possibility that the anonymous informant could have given evidence on the issue of his guilt which might have resulted in his exoneration.

Although not assigned as error on this appeal, we note that appellant's conviction for possession of marijuana for sale is, in the instant context, a necessarily lesser included offense within the more serious crime of selling marijuana for which he was also convicted. (*Cf. People v. Francis*, 71 Cal.2d 66, 71 et seq.) That is to say, since no marijuana was discovered in appellant's apartment, 2109, and it was not contended that he had any possessory rights in the contraband subsequently recovered from apartment 2117, the only marijuana which he "possessed for sale" was that which he, in fact, sold to Wolford. When a defendant is convicted of two offenses, one of which is necessarily included within the other, the conviction for the lesser offense must be reversed. (*People v. Pater*, 267 Cal.App. 2d 921, 926.)

The judgment is reversed as to Count IV, possession of

marijuana for sale. In all other respects the judgment is affirmed. (CERTIFIED FOR NONPUBLICATION.)

• • • •

APPENDIX "B"

CLERK'S OFFICE SUPREME COURT
[illegible] STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JUL 21 1971

Dear Sir: I have this day filed [illegible]

HEARING DENIED

In re 2 CRIM [illegible] No. 17583
PEOPLE
v.
JIMENEZ

Respectfully,

G E BISHEL
Clerk

APPENDIX "C"

STATUTORY PROVISIONS INVOLVED

California Health and Safety Code

§ 11531.

"Every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison . . . "

§ 11911.

"Except as otherwise provided in Article 8 (commencing with Section 4210) • • • of Chapter 9 • • • of Division 2 of the Business and Professions Code, every person who possesses for sale any restricted dangerous drug shall be punished by imprisonment in the state prison . . . "

California Penal Code

§ 1538.5. Motion to return property or suppress evidence.

"(a) Grounds

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on • • • either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable • • •

" . . .

" **(f) Felony motion at preliminary hearing**

" (f) If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

" . . .

" **(i) Felony; renewal of motion at special hearing; review**

" (i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

" . . .

" **(m) Exclusive pre-trial remedy; review on appeal after conviction**

" (m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall

constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence."

California Evidence Code

§ 1041. Privilege for identity of informer.

"(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and:

"(1) . . .

"(2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of

justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

"(b) This section applies only if the information is furnished in confidence by the informer to:

"(1) A law enforcement officer;

"(2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or

"(3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2).

"(c) There is no privilege under this section to prevent the informer from disclosing his identity. (Stats. 1965, c. 299, § 1041.)"

§ 1042. Adverse order or finding in certain cases

"(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material.

"(b) . . .

"(c) Notwithstanding subdivision (a), in any

preliminary hearing, criminal trial or other criminal proceeding, * * * any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a mterial witness to the guilt or innocence of the accused of the offense charged, * * * is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure."

United States Constitution

Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V

"No person shall be . . . deprived of life,liberty or property without due process of law; . . . "

Amendment XIV

" . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws."

■ ■ ■ ■

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on OCTOBER 16th 1971, I served the within PETITION FOR WRIT OF CERTIORARI (JIMENEZ v. PEOPLE OF THE STATE OF CALIFORNIA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Clerk, Superior Court of Los Angeles County
111 North Hill Street
Los Angeles, California 90012
For: Honorable Kathleen Parker, Judge [1 copy]

Attorney General, State of California
600 State Building
Los Angeles, California 90012 [2 copies]

District Attorney, County of Los Angeles
600 Hall of Justice
Los Angeles, California 90012 [1 copy]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCTOBER 16th 1971, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 322 Main St., Huntington Beach, Ca.
(714) 536-7161